Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1979.

No. 79-953

HELEN B. FEENEY,
APPELLANT,

v.

PERSONNEL ADMINISTRATOR OF THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Jurisdictional Statement.

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No.

HELEN B. FEENEY,
Appellant,

v.

PERSONNEL ADMINISTRATOR OF THE COMMONWEALTH OF MASSACHUSETTS, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT.

Helen B. Feeney submits this statement in support of her contention that a final judgment of the United States District Court for the District of Massachusetts should be summarily reversed and remanded for consideration of an adequately pleaded claim which the district court has refused to consider and on which it has refused to render any judgment or opinion. In the alternative, the appellant submits that the refusal by a district

court to hear and decide a claim properly before it raises substantial questions such that plenary consideration by this Court is warranted.

Mrs. Feeney contends that the three-judge district court (over the vigorous dissent of one of the judges) erroneously presumed that it had discretion to fail to consider and decide her claim that the absolute veterans preference statute violates her right to due process of law by arbitrarily denying to her an important interest in liberty.

Opinions Below.

This case has previously been before this Court and the judgment of the district court from which Mrs. Feeney is appealing was entered on August 23, 1979 after a previous judgment had been reversed and remanded by this Court for "proceedings consistent with this opinion." Personnel Administrator of Massachusetts v. Feeney, --U.S. at --, 99 S.Ct. at 2297 (U.S. 1979). Rather than conduct further proceedings the district court refused to consider and decide the plaintiff's remaining claim that the absolute veterans preference statute because of its wholesale deprivation of access to public employment denies her an important interest in liberty protected by the Due Process Clause. The Judgment of the district court and its Memorandum and Order and the Dissenting Opinion, which are published at 475 F.Supp. 109 (1979), are reproduced

as an appendix to this statement (App. A and B).

The two prior opinions of the district court are published at 415 F.Supp. 485 (Sub. nom. Anthony v. Commonwealth of Massachusetts) and at 451 F.Supp. 143.

Jurisdiction.

This is a direct appeal under 28 U.S.C. §1253 from a final judgment of a three-judge district court in the United States District Court for the District of Massachusetts. The three-judge tribunal was convened pursuant to 28 U.S.C. §§2281 and 2284 upon the application of Helen B. Feeney, plaintiff-appellant, for a permanent injunction to restrain the enforcement, operation and execution of the Massachusetts statute granting an absolute and permanent preference to veterans in its public employment system. Mrs. Feeney brought her action pursuant to 28 U.S.C. §§1331, 1343(3), 42 U.S.C. §1983, and 28 U.S.C. §2201, claiming that the Massachusetts veterans preference statute was invalid under the Equal Protection Clause and under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The final judgment in favor of the defendants on Mrs. Feeney's complaint was entered in the district court on August 23, 1979. Mrs. Feeney filed in the district court a Notice of Appeal to this

Court on October 19, 1979. A copy of this Notice of Appeal is reproduced as Appendix C to this statement.

Jurisdiction of this Court is conferred by 28 U.S.C. §1253. Cases believed to sustain jurisdiction are: Personnel Administrator of Massachusetts v. Feeney, --U.S.--, 99 S.Ct. 2282 (1979); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); United States v. Georgia Public Service Commission, 371 U.S. 285 (1963); Paul v. United States, 371 U.S. 245 (1963); Florida Lime and Avocado Growers v. Jacobsen, 362 U.S. 73 (1960).

Statute Involved.

The Massachusetts absolute veterans preference statute, presently codified at Mass. Gen. Laws, c. 31, §26, but referred to in previous opinions at Mass. Gen. Laws c. 31, §23, provides as follows:

> "The names of persons who pass examinations for original appointment to any position in the official service shall be placed upon the eligible lists in the following order: (1) Disabled veterans, in the order of their respective standings; (2) veterans, in the order of their respective standings; (3) widows or widowed mothers of veterans who were killed in action or died from a service connected disability incurred in wartime service, in the order of their respective standings; (4) all others in the order of their respective standings. Upon receipt of a requisition, names shall be certified from such lists according to the method

> of certification prescribed by the rules."

Question Presented.

Did the district court err in refusing to consider and to decide plaintiff's claim that the Absolute Veterans Preference Statute, Mass. Gen. Laws c. 31, §26, by its wholesale denial of access to public employment deprives her of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment?

Statement of the Case.

This action was commenced by Helen B. Feeney, the appellant here, on May 20, 1975 by the filing of a complaint in the United States District Court for the District of Massachusetts under 42 U.S.C. §1983. Her complaint alleged that the plaintiff, a female and a non-veteran, was deprived of her right both to equal protection of the laws and to due process of law under the Fourteenth Amendment by a state statute that provided an absolute preference for veterans.* The present defendants

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*The complaint detailed all the relevant facts including how the statute granted an absolute preference to veterans such that it systematically deprived the plaintiff and others, the majority of whom were women, of any meaningful opportunity to obtain civil service jobs. After these extensive factual pleadings the plaintiff in her Count I alleged as follows:

are the Personnel Administrator of the Commonwealth of Massachusetts and the members of the Civil Service Commission.

Mrs. Feeney's action was consolidated with a previously filed action challenging the same statutory scheme. The parties submitted a lengthy statement of facts with documentary exhibits describing in detail the operation of the absolute veterans preference statute within that system and its effect in systematically excluding from meaningful consideration all non-veteran applicants, the vast majority of whom are also women. In addition, both parties submitted lengthy briefs. The plaintiff's brief filed in August, 1975 offered a

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"36. The Veterans' Preference Statute and the rules and regulations of the Division implementing said Statute and their enforcement by the defendants have deprived and continue to deprive the plaintiff of the equal protection of the laws and of due process of law in violation of the Fourteenth Amendment to the United States Constitution in that they unlawfully discriminate in public employment on the basis of sex by systematically excluding qualified and eligible female applicants, including the plaintiff, from the group of eligible persons from which appointing authorities are required to make selections for appointment to permanent positions in the Classified Civil Service of the Commonwealth."

variety of arguments upon which it urged the district court to give the statute a heightened level of scrutiny under the Fourteenth Amendment and to hold it unconstitutional. The plaintiff's arguments for close scrutiny of the statute included not only a contention of sex discrimination premised on the fact that 98% of all veterans were male but also the contention that the concept of "liberty" in the due process clause clearly encompassed a "constitutional right not to be foreclosed from pursuing careers in public service on a basis of equal opportunity" and that such right "is fundamental to and inherent in the concept of liberty guaranteed in the Constitution." Brief of the Plaintiffs (August 13, 1975) p. 153. The plaintiff argued that the statute violated both the Equal Protection Clause and the Due Process Clause.

On March 29, 1976, the district court entered judgment in favor of Mrs. Feeney on her equal protection claim only. Its opinion is at 415 F.Supp. 485 (D.Mass.1976). It concluded that the equal protection of the laws was denied to women because, by the incorporation of the military's enlistment regulations, the veterans' preference formula "inescapably" denied to women as a class any meaningful opportunity to compete for civil service jobs of interest to men. As a result of this discriminatory effect on women, the district court utilized

a heightened level of scrutiny and concluded that the statute was invalid under the Equal Protection Clause. The district court made no finding on and did not consider the plaintiff's alternative claim of a violation of the Due Process Clause. The district court also made no finding on, and in its opinion provided no analysis of, the plaintiff's alternative argument that heightened scrutiny was warranted, not only on a theory of sex discrimination, but on the independent basis that the wholesale denial of access to public employment effected by the absolute preference system infringed upon the right to "liberty" guaranteed by the Fourteenth Amendment.

The Attorney General appealed the district court's judgment, and eventually this Court remanded the cause to the district court for further consideration in light of Washington v. Davis, 426 U.S. 229 (1976). The order of remand is reported at 434 U.S. 884 (1977).

On remand, the district court ordered the parties to file supplementary briefs and heard oral argument. In her supplementary brief, in addition to addressing the issue of whether the facts established an intentional discrimination against women, the plaintiff reminded the district court that she had an alternative claim that the statute violated the Due Process Clause. While her previous

arguments in 1975 on the deprivation of her interest in "liberty" had suggested an alternative basis for heightened scrutiny in the context of equal protection, in 1977 in light of this Court's decision in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), the plaintiff squarely argued that the infringement on her "liberty" violated the Due Process Clause. Plaintiff's Supplementary Memorandum of Law, (November, 1977) pp. 34-38. The refinement in plaintiffs' argument and her reminder to the court of the existence of her alternative claim was wholly apart from the argument that an intentional discrimination against women warranted heightened scrutiny. It was a claim and argument for heightened scrutiny that depended on the recognition that the wholesale exclusion from public employment of the plaintiff and others similarly situated deprived them of an interest in "liberty" protected by the Due Process Clause.

However, the district court again declined to decide or analyze the plaintiff's claim of a denial of due process but rather issued an opinion reaffirming only its prior holding in favor of Mrs. Feeney on her equal protection claim finding that the foreseeable and inevitable exclusion of women as a result of the use of the absolute preference was an intentional act within the meaning of Washington v. Davis, supra. Feeney v. Commonwealth of

Massachusetts, 451 F.Supp. 143 (D.Mass. 1978).

On August 10, 1978, the Attorney General again docketed an appeal in this Court by filing a Jurisdictional Statement in which the question presented to this Court was set forth as:

> "Does the preference afforded veterans by Mass. Gen. Laws c. 31, §23 violate the Equal Protection Clause of the Fourteenth Amendment?"

There being no judgment rendered by the district court on the plaintiff's due process claim, on appeal the briefs were limited to the issues relating to the finding of a violation of the Equal Protection Clause based on an intentional discrimination against women. However, at oral argument before this Court the following exchange occurred between Mr. Justice Stewart and the Assistant Attorney General, Mr. Thomas Kiley, who was appearing on behalf of the state defendant-appellants (Trans. of Oral Argument, Feb. 26, 1979, p.4):

> "QUESTION: Is this exclusively an equal protection case?
>
> "MR. KILEY: It is explicitly an equal protection case, Mr. Justice Stewart. It could not be a Title 7 case. Under Title 7, veterans' preference statutes are explicitly excluded.
>
> "QUESTION: And no reliance is placed upon the due process

> clause?
>
> "MR. KILEY: It is an equal protection clause case as it has been decided.
>
> "QUESTION: And as has been argued, supported?
>
> "MR. KILEY: Yes, Mr. Justice Stewart."*

These representations were accurate to the extent that they indicated that the case was then before this Court only on the Equal Protection Clause claim but somewhat misleading to the extent that they implied that the plaintiff had not claimed and argued a violation of the Due Process Clause which claim had not yet been decided or addressed by the lower court.

On June 5, 1979, this Court issued its opinion, reported at --U.S.--, 99 S.Ct. 2282 (1979), in which it held that the evidence did not support a finding of an intentional discrimination against women. Accordingly this Court reversed and remanded the cause to the district court for further proceedings consistent with its opinion. In reaching its results, this Court carefully set forth that

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*After the oral argument, counsel for Mrs. Feeney asked Mr. Kiley to correct the misstatement that the Due Process clause had not been relied on in the district court, but Mr. Kiley did not do so.

> "The sole question for decision on this appeal is whether Massachusetts, in granting an absolute lifetime preference to veterans, has discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment." 99 S.Ct. at 2292.

This Court did not address the alternative and undecided claim based on the Due Process Clause which the district court had yet to address.

After this Court's decision, the plaintiff promptly asked the district court to consider and to decide her alternative claim of a violation of the Due Process Clause. It had been almost four years since the original briefs had been filed and this Court in the intervening years had provided additional decisions bearing on due process claims such as Moore v. East Cleveland, 431 U.S. 494 (1977) and Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). Thus, Mrs. Feeney filed a motion requesting that the district court allow her to file a brief and for an oral argument on the claim, as yet undecided, that the absolute preference for veterans by the state deprived her of due process rights guaranteed by the Fourteenth Amendment.

In response, the Attorney General moved for immediate entry of judgment, and, in contrast with its suggestion to this Court in oral argument that the case had not previously been argued and supported on the due process claim, filed a memorandum

suggesting to the district court that the claim based on the Due Process Clause had already been "fully briefed and argued". Defendant's Memorandum, pp. 2-3.

The district court denied the plaintiff's request to file a brief and on August 23, 1979 entered a final judgment for the defendants. As explained in its Memorandum and Order, published at 475 F.Supp. 109 (D.Mass.1979)(App. B), the district court found only that to the extent that a claim of a violation of due process depended on a finding of intentional discrimination against women, the claim should be rejected because of this Court's opinion prior to remand. It expressly declined to decide or to enter any judgment on the claim of a denial of due process on the grounds that the statute deprived the plaintiff of an interest in liberty protected by the Due Process Clause.

In a dissenting opinion, Judge Tauro disagreed that the district court had any power to refuse to decide Mrs. Feeney's allegedly "new" due process claim which, Judge Tauro noted, even the majority had conceded was encompassed in the complaint. 475 F.Supp. at 112-113. He then went on to state that even if the court had such power to refuse to decide the "new" due process claim, it was unreasonable to exercise such power in the case before it where the record was complete and all that Mrs. Feeney

was requesting was a few weeks in which to prepare a thorough brief on the matter. Under these circumstances, Judge Tauro concluded, there was simply no justification for the district court to throw up its hands and leave the matter for another forum to decide, possibly after another several years of litigation.

The district court's failure to complete the trial of a properly pleaded claim and its failure to render a decision on a claim before it has occasioned the filing of this appeal. Thus, on October 19, 1979, Mrs. Feeney filed her Notice of Appeal to this Court from the decision of the district court.

The Question Presented is Substantial.

I. Introduction

The district court assumed that it could split plaintiff's claim of a violation of her rights under the Due Process Clause into a number of discrete arguments and decide some but not all of the arguments advanced in support of her claim. The district court's refusal to consider each of plaintiff's arguments in support of her due process claim and its refusal to decide her claim fully was erroneous for several reasons. In the first place, even assuming that some of plaintiff's present theories or arguments were "new" or different from what was

included in plaintiff's complaint or original brief, this did not by itself vest the district court with discretion to refuse to consider them. To the contrary, as numerous federal courts have repeatedly held, the whole point of the present federal rules of civil procedure is that a party should be granted the relief to which the facts show he is entitled, regardless of his failure to rely initially on the correct legal theory for such relief.

Secondly, the district court erroneously interpreted this Court's prior decision as mandating the immediate entry of judgment, no matter what undecided claims remained, "absent very compelling circumstances". 475 F.Supp. at 111. Yet this Court's prior decision gave the district court no such authority and established no such standard for its refusal to hear and decide fully the remaining due process claim.

Finally, the reasons set forth by the district court for refusing to consider and to decide fully the plaintiff's claim based on the Due Process Clause demonstrate an arbitrary unwillingness to decide a claim properly before it and are clearly insufficient to justify that court's refusal to decide the plaintiff's claim.

II. Under the Circumstances, the District Court Erroneously Presumed that it had Discretion Not to Decide Plaintiff's Due Process Claim.

The plaintiff submits that a careful review of the record would show that her previously advanced arguments in support of her due process claim were not dependent on a finding of intentional discrimination against women and thus disposed of by this Court's previous decision. However, even if one assumes, as the district court did, that plaintiff's arguments after remand constituted a "new" theory or argument in support of her undecided claim of a violation of her rights under the Due Process Clause, the district court was obligated to review all facts and arguments and decide whether under any legal theory plaintiff's claim entitled her to relief.

It is now widely agreed among the lower federal courts that under the Federal Rules of Civil Procedure a plaintiff's initial choice of one legal theory will not preclude him from obtaining relief under another legal theory so long as (1) the facts alleged in the complaint and established at trial show that the plaintiff is entitled to the relief in question and (2) the defendant has not been prejudiced by the change in legal theory. International Distributing Corp. v. American District Telegraph Co., 569 F.2d 136, 139 (D.C. Cir. 1977)(". . . federal courts grant the parties the relief to which the facts entitle them, even if the proper theory has not been pled.");

Janke Construction Co. v. Vulcan Materials Co., 527 F.2d 772, 776 (7th Cir. 1976)(". . . the fact that [plaintiff] misconceived the legal theory of its case does not preclude it from obtaining relief under another legal theory."); Sessions v. Chrysler Corp., 517 F.2d 759, 760-761 (9th Cir. 1975)("The fact that appellant mislabeled his cause of action against the individual defendants is irrelevant, so long as he is entitled to relief against them under any theory."); Jenkins v. Fidelity Bank, 365 F.Supp. 1391, 1398 (E.D.Pa.1973)("A complaint is not to be dismissed because the plaintiff has misconceived the proper legal theory of the claim."). As two leading authorities on the subject have written:

> "The federal rules, and the decisions construing them evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining his defense on the merits."

5 C. Wright and A. Miller, Federal Practice and Procedure, §1219, at 145 (1969 ed.).

The rule that a party ordinarily should be permitted to shift the legal theory on which he is proceeding is derived from several of the federal rules, including Rule 8, which provides that a

complaint need set forth only a "short and plain statement" of the basis for the court's jurisdiction, the nature of the party's claim, and the relief demanded, Rule 15, which allows liberal amendment of the pleadings, and Rule 54(c) which provides that:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

The manifest policy underlying each of these rules is that the parties should be granted the relief to which they are entitled under the facts as shown, regardless of the failure to plead, or initially rely on, the proper legal theory in support of the complaint. See also Rohler v. TRW, Inc., 576 F.2d 1260, 1264 (7th Cir. 1978)(". . . it is not necessary that the plaintiff set forth the legal theory on which he relies if he sets forth sufficient factual allegations to state a claim showing that he is entitled to any relief which the court may grant."); PDTC Owners Association v. Coachella Valley Cty., Water, 443 F.Supp. 338, 342 (C.D.Cal. 1978)("A court must therefore consider any legal theory under which the plaintiffs may prevail on the facts asserted in the pleadings.").

In the present case there was no possible prejudice to the defendants from plaintiff's

additional arguments in support of the due process claim, and the district court pointed to none. Thus, under each of the decisions referred to above, the district court simply had no power to refuse to consider all of plaintiff's arguments. To the contrary, the clear responsibility of the district court was to do what it had never previously done in this litigation--i.e., consider each of the facts which were properly pleaded and proved and determine whether those facts, under any legal theory, showed a violation of the Due Process Clause as alleged by plaintiff. The district court's refusal to perform this responsibility, or even to take briefs on the subject, was clearly improper, and should be reversed by this Court.

III. The District Court Erroneously Assumed That This Court's Prior Decision Somehow Gave it Authority to Ignore and Not Fully Consider the Undecided Claim.

As this Court has made clear with respect to its role:

> "When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. . . . Hence the rule is

> that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."

Mutual Life Insurance Co. v. Hill, 193 U.S. 551, 553-554 (1904); see also Sherwin v. Welch, 319 F.2d 729 (D.C. Cir. 1963) (The court reversed the district court for entering judgment based on a prior remand "for further proceedings not inconsistent with the opinion of this court" because the lower court erroneously failed to consider undecided issues).

In this case, neither this Court nor the district court had previously analyzed or decided the plaintiff's separate due process claim. Nevertheless, when it became time to do so as a result of this Court's remand, the district court concluded that it would be "improper" to delay entering final judgment, despite the pending undecided due process claim, absent some extraordinarily "persuasive showing"* because of this Court's decision on a different claim based on a finding of a violation of the Equal Protection Clause.

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*In fact, the plaintiff was effectively barred from making any such "persuasive showing" when the district court denied her motion requesting the opportunity to file a brief on the remaining claim.

Thus, the district court stated:

> "At this late date having in mind that the Court's decision commands the support of seven Justices, we would think it improper to delay implementation of the Court's opinion without a persuasive showing that the issues sought to be presented were both substantial and proper for our consideration at this time." 475 F.Supp. at 110.

However, what the district court ignored was that this Court had expressly stated that the "sole issue" it was deciding was whether there was a violation of the Equal Protection Clause. 99 S.Ct. at 2292. The order to the district court was "for further proceedings consistent with this opinion." 99 S.Ct. at 2297.

Nothing in this Court's prior decision gave the district court authority to fail to consider fully the remaining claim based on the Due Process Clause. This Court properly decided the sole issue presented to it. The district court in effect has taken the position that this Court sent it a broad but unstated "message" that the absolute preference statute is to be approved no matter what additional claim is still pending and that, without any further serious attempt at analysis of such alternative claim, the plaintiff should be immediately foreclosed from making any further arguments by the entry of final judgment against her.

This approach by the district court is not sanctioned by this Court's prior decision and is inconsistent with the orderly adjudication of claims by a trial court. The judgment should be reversed with instructions to consider and decide fully the claim that the statute denies the plaintiff an interest in "liberty" protected by the Due Process Clause.

IV. The Reasons Advanced For Failing to Decide Fully the Due Process Claim Are Patently Insufficient to Justify the District Court's Actions.

As the dissenting judge in the district court pointed out, the majority cited no pertinent authority in support of its presumption that it had discretion "to refuse to decide an issue adequately pleaded." 475 F.Supp. at 114 n. 5 (Tauro, J., dissenting)(App. 18a). The majority did, however, proffer a number of purported reasons for its refusal to consider the remaining due process claim. None of these reasons warranted the court's refusal to act.

First, the majority suggested that further argument was inappropriate because "it would needlessly delay entry of judgment and unfairly affect those who stand to benefit from the Massachusetts Veterans Preference law." 475 F.Supp. at 111. This proposition is entirely specious.

As soon as this Court reversed the district court's prior judgment, there was no longer any injunction against use of an absolute preference for veterans and the Commonwealth was entirely free to grant all the absolute preferences it desired. There was simply no prejudice at all that would have accrued to the defendants or to anyone else if the plaintiff was allowed to brief fully and the district court proceeded to decide fully the remaining due process claim.

Secondly, the district court suggested that somehow the plaintiff has attempted to engage in "piecemeal" litigation. 475 F.Supp. at 111. However, it was the district court itself that chose initially to decide only the claim based on the Equal Protection Clause. When the basis for the judgment on that claim was reversed, plaintiff moved immediately for a decision on the previously undecided claim by asking for a briefing schedule and oral argument. The delay in deciding the due process claim was entirely the result of the district court's decision to decide only one claim. It is simply unfair now to blame the plaintiff and refuse to consider and to decide her remaining claim.

In addition, the district court's suggestion that "an interest in orderly litigation" gave it authority to refuse to hear the claim "absent

very compelling circumstances", 475 F.Supp. at 111, is specious. As the dissenting judge pointed out:

> "Such an approach is inconsistent with all accepted concepts of efficient judicial administration. . . .
>
> "The record in this case is complete. There is no need for further evidence. We are familiar with the facts and the general positions of the parties. All that remains is for plaintiff's counsel to have the opportunity to brief and argue the due process issue . . . .
>
> "What the majority has said, however, is that we will not even hear the plaintiff's theory and that final resolution of the long pending Veterans Preference saga must be postponed until some indefinite time in the future. I feel the more responsible approach would be to hear the parties now and then decide the issue. I see no justification in imposing this responsibility on some other forum." 475 F.Supp. at 114 (Tauro, J., dissenting).

Finally, while conceding that recent decisions of this Court may have afforded greater support for her due process claim, 475 F.Supp. at 112, the district court concluded that plaintiff's undecided due process claim "faces an uncertain future". 475 F.Supp. at 112. This consideration is meaningless since any undecided claim is "uncertain", particularly when it has not been briefed or analyzed in light of the facts of the particular case presented to the

court. In no sense can the "uncertainty" of a claim provide a logical basis for a trial court to refuse to decide a claim otherwise properly before it.

Thus, upon analysis, the reasons advanced for refusing to act upon the undecided claim are insubstantial. They only underscore the injustice accorded the plaintiff by the refusal to consider fully the complex issues relating to her claim that the use of an absolute preference is such a wholesale denial of access to a major occupation--public servant--that it infringes on the "liberty" protected by the Due Process Clause.

Conclusion.

The questions presented in this statement are substantial, involving as they do the basic issue of a trial court's refusal even to hear or decide a claim properly before it. The appellant respectfully urges this Court to reverse summarily

the decision of the district court or to note probable jurisdiction and set the case down for argument.

Respectfully submitted,

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Appendix A.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

HELEN B. FEENEY,

Plaintiff

vs. CIVIL ACTION NO. 75-1991-T

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.

Defendants

JUDGMENT

Judgment is entered in favor of the defendants in Feeney v. Commonwealth, C.A. 75-1991-T on the ground that Mass. Gen. Laws c. 31, §23 does not discriminate on the basis of gender and does not for that reason violate the provisions of the Fourteenth Amendment to the Constitution of the United States.

August 23, 1979

LEVIN H. CAMPBELL
CIRCUIT JUDGE

FRANK J. MURRAY
DISTRICT JUDGE, SENIOR

Appendix B.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

HELEN B. FEENEY,

Plaintiff

vs.

CIVIL ACTION
NO. 75-1991-T

THE COMMONWEALTH OF
MASSACHUSETTS, ET AL.,

Defendants

MEMORANDUM AND ORDER.

August 17, 1979.

After the Supreme Court's opinion and judgment reversing this court's decision in the present case, Personnel Administrator of Massachusetts v. Feeney, --U.S.--, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), plaintiff moved that we set a briefing schedule and entertain oral argument on plaintiff's due process claims which, she says, have not so far been considered in this litigation and were not foreclosed by the Supreme Court's ruling. Plaintiff's motion is vigorously opposed by the Commonwealth of Massachusetts, which has moved for immediate

entry of a final judgment in its favor.

This court has already written in the present case two opinions concerning the Massachusetts Veterans Preference statute, the more recent in response to a remand from the Supreme Court directing reconsideration of our first opinion. The matter is now before us upon the Court's remand for further proceedings consistent with its opinion. Id., ---, 99 S.Ct. 2282. At this late date, having in mind that the Court's decision commands the support of seven Justices, we would think it improper to delay implementation of the Court's opinion without a persuasive showing that the issues sought to be presented were both substantial and proper for our consideration at this time.

It is true that a violation of due process as well as of equal protection was alleged in the complaint, and that due process arguments were advanced in the briefs within the context of claims of sex discrimination. It is also true that the majority opinions of this court, and the decision

of the Supreme Court overturning same, were premised on the equal protection clause of the fourteenth amendment,[1] leaving it to this court to deal now with any remaining due process issue that was earlier raised and not decided.

We do not believe, however, that the due process issues that were pleaded and previously addressed in the parties' briefs and arguments encompassed the principal contention plaintiff now seeks additional time to brief and argue. The argument now sought to be raised does not rest on alleged sex discrimination but on the claim that the Massachusetts Veterans Preference law denies access to public employment on a wholesale basis and

[1]Writing for the Court, Mr. Justice Stewart stated the issue as follows: "The sole question for decision on this appeal is whether Massachusetts, in granting an absolute lifetime preference to veterans, has discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment." Personnel Administrator of Massachusetts v. Feeney, ---U.S. at ---, 99 S.Ct. at 2292 (U.S. 1979).

therefore deprives the excluded non-veterans, who would be male as well as female, of liberty. See Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976).[2] This argument was not developed until now and, for reasons hereinafter discussed, we are not inclined to permit plaintiff to begin over again with this new theory of constitutional violation.

(1) The due process claims stated in the complaint and in previous briefs were of a different order, being allied to the sex discrimination claim underlying plaintiff's equal protection argument. Paragraph 36 of the complaint alleged that by systematically excluding qualified and eligible female applicants on the basis of sex, the Massachusetts Veterans Preference statute deprived the

[2]Plaintiff did cite Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), in a supplemental memorandum submitted after the Supreme Court's remand for reconsideration in light of Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), but based her substantive due process liberty argument on the statute's "near blanket, permanent exclusion of women from a major sector of employment." (Emphasis added.)

plaintiff of the equal protection of the law and of due process. Sex discrimination was also central to a due process claim asserted in paragraph 45 resting on the sex-biased nature of the armed forces. The major due process argument in plaintiff's brief proceeded on the theory that, by creating an irrebuttable presumption in favor of veterans, the statute worked an invidious discrimination against women. These theories were all bottomed on sex discrimination. It was not contended that non-veterans of both sexes were unconstitutionally deprived of a liberty interest in public employment.

The due process arguments set forth in the preceding paragraphs--which are the ones raised in the previous course of this litigation--are, we think, rendered insubstantial by the Supreme Court's decision in this case. While the Court's decision speaks to the equal protection clause, it leaves little if any room for sex discrimination arguments resting on the due process clause. Thus the claim in paragraph 45 of the complaint, referring to due

process and equal protection, was specifically disposed of on pages 19-20 of the Court's opinion, although without actual reference to the due process component. We find it inconceivable that after rejecting a claim of sex discrimination based on equal protection grounds, the Court would accept a comparable claim resting on due process grounds. Nothing in its opinion or in the applicable law invites such an assumption. We therefore hold against plaintiff on these originally stated due process claims at this time, believing that any further argument to us concerning them would serve no purpose, and would furthermore be inappropriate as it would needlessly delay entry of judgment and unfairly affect those who stand to benefit from the Massachusetts Veterans Preference law.[3] If we have

[3] As we point out in this memorandum, the plaintiff was fully heard on her due process claim in the previous course of the litigation in this court on her briefs and in oral argument. The court did not reach the due process argument, electing to rest the decision on the equal protection ground, Anthony v. Com. of Mass., 415 F.Supp. 485, 499 n. 15. (The argument was considered in the dissenting opinion. Id. at 504-05 n.9.) This,

misread the Court, plaintiff is, of course, free to seek correction by the Court itself.

(2) We are left with plaintiff's newly-raised due process argument--that non-veterans' substantive liberty interest in public employment is subverted by the Massachusetts Veterans Preference law. As already indicated, this presents a new legal theory, distinct from any previously stated. While upon remand from the Supreme Court we feel obliged to determine previously raised questions that still remain open (and so have here decided the particular due process arguments mentioned in the preceding paragraph), we do not feel the same way about newly-tendered legal theories. We could perhaps entertain

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of course, did not foreclose plaintiff as the prevailing party from presenting the due process claim to the Supreme Court. Dandridge v. Williams, 397 U.S. 471, 475-76 n.6, 90 S.Ct. 1153, 1156, 25 L.Ed.2d 491 (1970). We now have decided against plaintiff on the due process claim in light of the previous hearing of the issue and the Supreme Court's opinion and judgment. We think such consideration can hardly be viewed as "dispos(ing) of plaintiff's sex based due process theory in one sentence." We know of no authority which requires the court to hear plaintiff's claim a second time.

such claims as a matter of discretion. However, at this very late stage, an interest in orderly litigation cautions against entertaining arguments not previously raised absent very compelling circumstances; parties should ordinarily litigate all issues at one time rather than piecemeal. Cf. United States v. Charest, 602 F.2d 1015 at 1018 (1st Cir. 1979) (government may not, on appeal, change focus of case and thereby seek to present an entirely different case); Rodriguez de Quinonez v. Perez, 596 F.2d 486, 492 (1st Cir. 1979), petition for cert. filed, 47 U.S.L.W. 3826 (U.S. June 26, 1979) (petition for rehearing will not be granted to hear new argument which could have been earlier raised); Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968, 970-71 (6th Cir. 1973), cert. denied, 416 U.S. 939, 94 S.Ct. 1942, 40 L.Ed.2d 290 (1974) (no abuse of discretion to deny motion to assert alternative theory of recovery after defendant had had to defend against theory originally presented at both the trial and

appellate level); Powers v. Bethlehem Steel Corp., 483 F.2d 963, 964 (1st Cir. 1973)(noting importance of bringing an orderly end to litigation). It may be that decisions have recently come down affording somewhat greater support to plaintiff's new theory than was available two years ago, but clearly the law has not changed so much in plaintiff's favor that the present denial of relief is demonstrably wrong or palpably unjust or erroneous. See Legate v. Maloney, 348 F.2d 164, 166 (1st Cir. 1965). To the contrary, plaintiff's new claim at very best faces an uncertain future, and its prospects are scarcely improved by the fact that a sizeable majority of the Supreme Court has--on another ground to be sure--just approved the Massachusetts Veterans Preference law. It would be unfair to defendants, after the latter have prevailed on the equal protection and now the due process theories originally presented, to allow plaintiff to test yet another theory and to continue on what would become a new law suit. This is not to say that

plaintiff or others may not pursue whatever further state or federal remedies may yet properly be available to them concerning the controversial legislation in issue, but the time has come to put this particular case to rest.

We therefore deny plaintiff's motion for further argument. We allow defendant's motion for entry of judgment in the form proposed in the draft, except we strike the word "otherwise" in the fourth line and insert the words "for that reason."

So ordered.

TAURO, District Judge, dissenting.

The basic issue before this court involves a request by plaintiff's counsel to file a brief and make oral argument to the effect that the Massachusetts Veterans Preference Act (The Act) is unconstitutional as being violative of his client's due process rights under the Fourteenth Amendment. I would grant plaintiff's counsel's request for two reasons. In the first place, I know of no authority, and the majority cites none on point,

which would permit a trial court to refuse to consider and decide a legal issue adequately pleaded.[1] Second, it makes sense as a matter of efficient and responsible judicial administration for this court to decide the remaining issue in this case, rather than leave that task to another forum. I will treat these points seriatim.

[1]Plaintiff's complaint must be read as encompassing a broad Fourteenth Amendment attack on the constitutionality of the Act, as well as a narrow challenge on a theory of sex discrimination. Paragraph six of the complaint states:

> This is an action for declaratory and injunctive relief . . .commenced to redress the deprivation, . . ., of rights of the plaintiff secured to her by the Fourteenth Amendment to the United States Constitution.

Paragraph seven states:

> There exists an actual controversy between the plaintiff and defendants as to the constitutionality of the hiring practice , . . ., which gives to qualified candidates for permanent positions in the Classified Civil Service who are veterans a preference in rank over non-veteran qualified candidates on the eligible lists from which certifications to permanent positions in the Classified Civil Service are made.

I.

Plaintiff's complaint embodies both equal protection and due process challenges to the Act. The majority of this court twice opined that the Act did not afford plaintiff equal protection of the law and, therefore, was unconstitutional. We made no judgment with respect to any possible due process claim pleaded by the plaintiff.

The Supreme Court remanded our first opinion for reconsideration. The Court later reversed our second opinion and remanded for "proceedings consistent with this opinion." Personnel Administrator of Massachusetts v. Feeney, --U.S. at--, 99 S.Ct. at 2297 (U.S.1979). In reversing us, the Court specifically limited its holding to an analysis of plaintiff's equal protection claim. Any

Certainly, the complaint would survive a motion to dismiss based on a theory that it failed to allege a due process deprivation based on veteran--non-veteran status.

due process claims were left open.[2]

In my view, the Court's mandate for "proceedings consistent with this opinion" requires that we reconvene to consider and decide any and all remaining theories for relief pleaded in plaintiff's complaint. The prime issue left unresolved by both this court and the Supreme Court is whether the Act serves to deprive the plaintiff of Fourteenth Amendment due process guarantees. The due process issue has two related but independent theories. The first revolves around plaintiff's status as a woman non-veteran. The second embodies a broader challenge based on plaintiff's status as a non-veteran, without reference to sex as a pivotal factor.

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[2] "The sole question for decision on this appeal is whether Massachusetts, in granting an absolute lifetime preference to veterans, has discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment." Feeney, supra, --U.S.--, 99 S.Ct. at 2292 (emphasis supplied).

My colleagues now join in a new majority, expressing the thought that the Supreme Court's decision on the plaintiff's equal protection claim would be dispositive of any due process claim based on sex. On that premise they dispose of plaintiff's sex based due process theory in one sentence,[3] without even affording plaintiff the opportunity to be heard on the subject. While I am usually among the first to applaud expeditious resolution of litigation, I feel compelled to disassociate myself from such summary disposition of a properly pleaded constitutional issue.

Notwithstanding that holding by the majority, the circumstances of this case compel further consideration of plaintiff's complaint by this court.

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[3] "We therefore hold against plaintiff on these originally stated due process claims at this time, believing that any further argument to us concerning them would serve no purpose, and would furthermore be inappropriate as it would needlessly delay entry of judgment and unfairly affect those who stand to benefit from the Massachusetts Veterans Preference law." Majority Opinion at page 111.

Even if it is conceded that the Court's equal protection opinion would be controlling, as opposed to persuasive, precedent to a due process challenge by plaintiff based on sex, there remains open the broader question as to whether the Act deprives non-veterans, males and females alike, of due process. The majority apparently concedes that this broader issue was adequately pleaded by the plaintiff,[4]

[4]The majority opinion states at page 110, "(A) violation of due process as well as of equal protection was alleged in the complaint, . . . " A later comment by the majority in the succeeding paragraph makes its position less certain. "We do not believe, however, that the due process issues that were pleaded and previously addressed in the parties' briefs and arguments encompassed the principal contention plaintiff now seeks additional time to brief and argue."

In any event, it has long been settled that, under Rule 8 of the Federal Rules of Civil Procedure, a complaint is only required to contain a short and plain statement of facts demonstrating that the pleader is entitled to relief. "It is not necessary to set out the legal theory on which the claim is based." Siegelman v. Cunard White Star, 221 F.2d 189, 196 (2d Cir. 1955)(J. Harlan)(emphasis added). See also 2A Moore's Federal Practice section 8.14

though not argued to date. In our prior opinions, however, we did not foreclose plaintiff's due process claims. Rather, we merely determined that it was not necessary to reach due process issues in view of our disposition of the equal protection claim. We have since been reversed and mandated to take action consistent with the Court's opinion. We, therefore, must now do that which we thought unnecessary in our prior opinions, that is address the due process issues.

The fact that to do so now may amount to piecemeal review of the complaint is not the fault of the plaintiff. Indeed, it is not the fault of this court. We thought, incorrectly, that by focusing on the single issue of equal protection, the question of the Act's constitutionality would be resolved. The fact that, in good faith, we have spent several years wandering down the wrong path does not mitigate our responsibility to now decide the remaining constitutional challenge raised by plaintiff in her complaint. In short, we have no

power to refuse to decide.[5]

II.

Even assuming we have some discretion with respect to what issues we will or will not decide, common sense demands that we address the one issue remaining in this case--that of due process. The majority's position basically is that it is too late in the game for us to take up a due process issue not yet briefed or argued. It believes the resolution of that issue is better left to another day before another forum. Such an approach is inconsistent with all accepted concepts of efficient judicial administration. If, while this case was pending, the plaintiff had filed an independent due process challenge in this District, that case would have been assigned to this forum as a "related

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5 The majority presumes it has the discretion to refuse to decide an issue adequately pleaded. The cases it cites in support of such a proposition are clearly inapposite. Each deals with an attempt by a party to inject a new issue after a hearing on the merits. The plaintiff here, however, has never had a hearing on the merits of her remaining due process claims. See Majority Opinion at pages 111 and 112.

case" under Local Rule 8. We have such a rule because we seek to avoid imposing any unnecessary duplication of effort on the busy judges of this court.

The record in this case is complete. There is no need for further evidence. We are familiar with the facts and the general positions of the parties. All that remains is for plaintiff's counsel to have the opportunity to brief and argue the due process issue. Counsel represented to us that his brief could be filed within a few weeks. Oral argument could be limited by us to an hour or so, if indeed we thought argument was necessary. The entire matter could be concluded by late fall.

What the majority has said, however, is that we will not even hear the plaintiff's theory and that final resolution of the long pending Veterans Preference saga must be postponed until some indefinite time in the future. I feel the more responsible approach would be to hear the parties

now and then decide the issue. I see no justification for imposing this responsibility on some other forum.

Appendix C.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

HELEN B. FEENEY,

Plaintiff

vs.

CIVIL ACTION
NO. 75-1991-T

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.

Defendants

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given that Helen B. Feeney, plaintiff herein, acting pursuant to Supreme Court Rule 10, hereby appeals to the United States Supreme Court from the Judgment entered in this action on the twenty-third day of August, 1979. This appeal is taken under 28 U.S.C. § 1253.

By her attorneys,

Richard P. Ward
Eleanor D. Acheson
John H. Mason

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225 Franklin Street
Boston, Massachusetts

October 19, 1979

Supreme Court, U. S.
FILED
JAN 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-953

HELEN B. FEENEY,

Appellant,

v.

PERSONNEL ADMINISTRATOR OF THE COMMONWEALTH OF MASSACHUSETTS, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

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January 17, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-953

HELEN B. FEENEY,

Appellant,

v.

PERSONNEL ADMINISTRATOR OF THE COMMONWEALTH OF MASSACHUSETTS, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Acting pursuant to Rule 16 of the Rules of the Supreme Court of the United States and for the reasons set forth in the following pages, Appellees hereby move that the final judgment and decree of the District Court be affirmed on the ground that the question presented by the jurisdictional statement is so unsubstantial as not to require further argument.

PRELIMINARY STATEMENT

As the Jurisdictional Statement suggests, this cause has been before this Court on several prior occasions.[1/] Unlike the prior occasions when this Court's jurisdiction has been invoked to hear this matter, this appeal raises no significant constitutional questions. Rather than presenting substantive argument that the Massachusetts Veterans Preference Statute, Mass. Gen. Laws c. 31, § 26 violates the equal protection or due process clauses of the Fourteenth Amendment, the current appeal raises only questions concerning the decision of the District Court after remand not to permit the plaintiff to brief and argue an alternative due process theory which had not been previously developed in any of the prior proceedings. This discrete procedural issue does not present a substantial question requiring further consideration by this Court.

Last term this Court gave plenary consideration to this cause and held the employment preference extended to eligible veterans by Massachusetts law did not

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1/ The procedural history of this case is adequately set forth in the jurisdictional statement (hereinafter cited as JS) pages 2-14, and is not repeated herein. Except as explicitly noted, the Appellees accept the preliminary materials contained in the jurisdictional statement.

discriminate against females in violation of the equal protection clause of the Fourteenth Amendment. This Court therefore reversed the decision of the United States District Court for the District of Massachusetts and remanded this cause for "proceedings consistent with its opinion." Personnel Administrator of Massachusetts v. Feeney, __U. S.__, 99 S.Ct. 2282 (1979). The earlier lower court decision had been premised entirely on a perceived violation of the equal protection clause. Anthony v. Commonwealth of Massachusetts, 415 F. Supp. 485, 499 n. 15 (D.C. Mass) 1976. Insofar as this Court decided the Equal Protection claim, the major issue facing the District Court on remand arose from plaintiff's originally asserted but unresolved due process claim.

The three judge panel on remand did consider and decide the plaintiff's pre-existing due process claims. After a hearing,[2/] the lower court expressly rejected the plaintiff's previously articulated gender-based claims, noting that the issues had been previously briefed and argued (J.S. 7a, n.3), that the arguments made had been rendered "insubstantial" by this Court's opinion

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2/The District Court's decision and order on remand are reported at 475 F.Supp. 109 (D. Mass. 1979). The citations to that decision and order in this brief, however, are to the Court's decision which is reproduced in the Jurisdictional Statement as Appendix A, B, and C, pages 1a-21a.

(J.S. 6a), and that further arguments on the sex-based due process claims served no purpose (J.S. 7a). Although the Appellees will concede that the plaintiff's complaint, briefs and arguments from the outset of this litigation encompassed the assertion that the alleged systematic exclusion of women from public employment resulting from application of the veterans preference statute violated the due process clause of the Fourteenth Amendment, the Plaintiff has not challenged the adverse rulings on her original due process claims in these proceedings.3/

3/ The question the Plaintiff poses to this Court on this appeal is: "Did the District Court err in refusing to consider and decide plaintiff's claim that the absolute veterans preference statute, Mass. Gen. Laws. c. 31, § 26, by its wholesale denial of access to public employment deprives her of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." (J.S. 5) Under Rule 15 (1)(c) of the Rules of the Supreme Court of the United States ". . . Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the Court." One can hardly argue that the discrete procedural question set forth in the jurisdictional statement (J.S. 5), embraces a substantive due process challenge to the Massachusetts Veteran's Preference statute. Thus, the Plaintiff must be deemed to have waived her appellate rights on the issue of whether the application of the Massachusetts public employment law deprives female job applicants of due process in contravention of the Fourteenth Amendment.

The lower court did refuse however, to consider what it correctly perceived to be a new due process claim, i.e. "that the Massachusetts Veterans Preference law denies access to public employment on a wholesale basis and therefore deprives the excluded non-veterans, who would be male as well as female of liberty." (J.S. 4a, 5a) That refusal to broaden the scope of the district court proceedings came nearly four years after the complaint was filed and only after plaintiff's primary gender-based claims had been rejected.

From its inception, this matter has been treated by the parties and the Courts as a sex-discrimination case: the agreed statement of facts, the briefs of the parties and the decisions of the courts all amply demonstrate that fact. A typical characterization of the plaintiff's cause of action appears in the introduction to the plaintiff's original brief on the merits to the District Court:

> "The plaintiffs in these actions are <u>women</u> who have been deprived of equal consideration for particular Civil Service employment opportunities as a result of the defendants' application of the Veterans' Preference Statute. Since the application of this statute by the defendants has a significantly disproportionate adverse impact on <u>women</u> seeking Civil Service positions, the plaintiffs respectfully submit that their right to equal protection of the Commonwealth's law, as secured to them by the Fourteenth Amendment to the United States

> Constitution, has been violated. The plaintiffs also submit that their Constitutionally-protected right to due process has been violated." Brief for the Plaintiffs, p.1 (emphasis added).

That the lower court shared this view of the case is made manifest in the opening sentence of the original district court opinion: "[challenge to] . . . Massachusetts Veterans' Preference Statute, Mass. Gen. Laws c. 31, § 23, which [plaintiff's] claim unconstitutionally discriminates against them because of their sex." Anthony v. Commonwealth of Massachusetts, 415 F.Supp. 485, 487 (D. Mass. 1976.) The Court's view is made more explicitly in the District Court's attempt to distinguish this action from others which had challenged veterans preference legislation on a non-gender specific basis. Id. at 496, 497, n.11. The decision not to allow the plaintiff to proceed anew under an alternative due process theory was clearly correct and should be affirmed by this Court.

The plaintiff now argues that it was error for the District Court not to consider a non-gender based argument for the first time on remand. In support of this argument, the Plaintiff/Appellant does not assert that there is a conflict between the circuits on the procedural issue presented, nor does she cite any direct authority for the proposition that after remand, the lower court was required to consider her new argument. Instead, the

jurisdictional statement speaks of the "spirit" of the Federal Rules of Civil Procedure, which require a liberal interpretation of pleadings to preserve the valid, but inartfully expressed and sometimes excusably overlooked, claims of litigants. (J.S. 16-18). She then analogizes this case to a series of matters decided in the preliminary stages of litigation upon a party's motion to dismiss under Fed.R.Civ.P. Rule 12, upon motions for summary judgment under Fed.R.Civ.P. 56, or within the spirit of Fed.R.Civ.P. 8.

These analogies are not appropriate to this case. This cause is not in the preliminary stages of litigation. The complaint was filed in the spring of 1975 and the Statement of Agreed Facts, which comprise the record in this case, was filed that summer. Therefore, the issues in this case have been joined for more than four years. If an analogy in the Federal Rules of Civil Procedure is proper under these circumstances, plaintiff's request to brief and argue this alternate claim is more appropriately compared to those requests which invoke the liberal spirit of the Federal Rules of Civil Procedure after trial has concluded and judgment has been entered.[4/] A consideration of

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[4/] Examples, of such post trial/post judgment motions are: Motions to Amend under Federal Rules of Civil Procedure 15; Motions for Relief from Judgment or Orders under Fed.R.Civ.P. 60; Motions for New Trials, Amendment or Judgments under Fed.R.Civ.P. 59.

the standards that the Courts commonly utilize in ruling on such requests leave no doubt that the decision of the District Court was correct and should be affirmed.

ARGUMENT

The Argument That the Lower Court Was Required On Remand to Permit the Plaintiff To Brief and Argue a Previously Undeveloped Due Process Theory Does Not Present A Substantial Question Requiring Further Consideration By This Court.

A. The Nature of Proceedings on Remand is Committed to the Discretion of the Trial Court.

It is a basic proposition that in the absence of a specific mandate or limiting instructions from an appellate court, the nature and extent of proceedings on remand is committed to the discretion of the district court. Sherwin v. Welch, 319 F.2d 729 (D.C. Cir. 1963); United States v. 63.04 Acres of Land, 257 F.2d 68 (2nd Cir. 1958); and See 3 Moore's Federal Practice §15.11, 6 Moore's Federal Practice §59.06-07, 59.16 (1953).[5/]

[5/]Even where a case is remanded to the trial court with directions to undertake a specific act or reach a particular result, the trial court is vested with a wide range of discretion in determining the method of compliance. Sprague v. Ticonic National Bank, 307 U.S. 161 (1939); Wm. G. Roe & Co. v. Armour & Co., 414 F.2d 862 (5th Cir. 1969); Holliday v. Pacific Atlantic S.S. Co., 117 F.Supp. 729, 732 (D. Del. 1953).

Apparently, the plaintiff does not take issue with this blackletter proposition, but suggests that the trial court must, years after the case has been submitted and the issues joined, allow her leave to develop alternate constitutional theories subsumed in the complaint but never previously argued. The Plaintiff appears to suggest that having once invoked the broad mantel of the due process clause in a single paragraph of her complaint, the trial court must permit her on remand to argue any due process theory she can devise.

The Commonwealth and its officers do not contend that the district court was precluded from allowing the plaintiff to change the basic thrust of her case. Recognizing that on a general order of remand and in appropriate circumstances the trial court has authority to permit amendments to original pleadings where justice so requires, Bryan v. Austin, 354 U.S. 933 (1957); Chicano Police Officer's Association v. Stover, 552 F.2d 918 (10th Cir. 1977) the state defendants have instead argued that considerations of judicial economy, comity, and fundamental fairness all dictated against permitting such a shift in theory to occur. In the total absence of contrary authority, the Commonwealth continues to assert that once the trial court was revested with jurisdiction by the order of remand, the decision whether or not to permit a change in the basic thrust of

the case was committed to its sound discretion and may be reversed only upon a showing of abuse of discretion. The plaintiff makes no such showing.

B. The District Court's Decision Not to Permit the Plaintiff to Brief and Argue a New Due Process Theory Was A Proper Exercise of Discretion.

By asserting that the decision whether to permit major shifts in litigation is within the sound discretion of the trial court, the Appellees do not mean to suggest that there are neither limits to that discretion nor guidelines for its proper exercise. To the contrary, both the parties seem to argue that the Federal Rules of Civil Procedure, their underlying "spirit" and the cases construing the rules provide an appropriate touchstone against which the action of the trial court may be measured. The parties apparently disagree, however, on which rules govern the instant case.

In her argument that the trial court was compelled to consider her non-gender specific due process claim, the Plaintiff cites a series of cases all dealing with the early termination of litigation. (J.S. 16-18) She references cases dealing with the broad scope of Fed. R. Civ. P. 8 in the context either of appellate review of motions to

dismiss[6/] or motions for summary judgment.[7/] However, it is one thing to suggest that imprecise pleadings ought not deny an unsophisticated plaintiff an opportuntiy to be heard on her claims. It is quite another to permit a well-represented individual to change the basic thrust of a case after losing her original claim.[8/] On the particular facts of this case, the

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6/Session v. Chrysler Corp., 517 F.2d 759, (9th Cir. 1975); Jenkins v. Fidelity Bank, 365 F. Supp. 1391 (E.D. Pa. 1973); PDTC Owners Association v. Coachetta Valley Cty. Water, 443 F.Supp. 338 (C.D. Cal. 1978); Rohler v. TRW, Inc., 576 F.2d 1260 (7th Cir. 1978).

7/International Distributing Corp. v. American District Telegraph Co., 569 F.2d 136, 139 (D.C. Cir. 1977). The Plaintiff cites an additional case which is of no support to her cause. See Janke Construction Co. V. Vulcan Materials Co., 527 F.2d 772 (7th Cir. 1976). There the Court ruled that the trial Court did not err in its award of damages to the Plaintiff even though the plaintiff neglected to raise the doctrine of promissory estoppel. Surely the Plaintiff does not suggest that the District Court was responsible for locating the proper theory on which she had the best chance of success.

8/Rodriguez de Quionez v. Cesar Perez, 596 F.2d 486, 492 (1st Cir. 1979). And, as at least one court has noted, "a losing party can always argue that [s]he misconceived the law." Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968 (6th Cir. 1973).

plaintiff's motion to permit further briefing and argument on her alternate due process claim is the functional equivalent of a motion to amend her complaint.[9/] The spirit of the Federal Rules of Civil Procedure would dictate that such a motion to amend would be liberally allowed, but only where the interest of justice were served by such an allowance. Foman v. Davis, 371 U.S. 178, 182 (1962).

It is beyond cavil that the allowance of a motion to amend is discretionary with the trial court. Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 330 (1971); Foman v. Davis, supra. Foremost among the factors that the court should consider in exercising its discretion is the prejudice which will inure to the opposing party if the amendment is allowed. 371 U.S.at 182. Here, the trial court afforded primacy to that consideration, noting that "It would be unfair to defendants, after . . . [having] prevailed on the equal protection and now the due process theories originally presented, to allow plaintiff to test yet another theory and to continue on what would become a new law suit." (J.S. 10a)

The injury to the state defendants would be exacerbated by the fact that they negotiated the Statement of Agreed Facts in this case without concern

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9/See, United States v. Charest, 602 F.2d 1015 (1st Cir. 1979); Bryne v. United States, 218 F.2d 327, 335 (1st Cir. 1955).

for this new claim. If the plaintiff had been permitted to argue her new theory of a Constitutional violation, the defendants would have been prejudiced in the sense that they were not given the opportunity to present facts relevant to the particular new claim. The prejudice to the Commonwealth is further magnified by virtue of the cloud the new claim would have unnecessarily imposed on the civil service employment rights of preference-eligible individuals, who received a point preference as opposed to a positional preference during the pendency of the district court proceedings. Mass. St. 1976, c. 200.

Another key factor in the exercise of discretion is whether the motion for further briefing and argument was timely. Where a litigant could have presented a particular theory of recovery at the outset of the case or during the progress of the litigation, she should not be permitted to rely on her misconception of the law as an excuse for the late presentation of an alternate theory of recovery. Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968 (6th Cir. 1973). It was only after remand that the plaintiff chose to cast her due process claim in a non-sex specific manner. Mrs. Feeney's characterization of her due process claim as one arising from sex discrimination was a conscious strategy of litigation; she has always been a member of

both the class of Massachusetts citizens who are non-veterans as well as the sub-class of female non-veterans. There is absolutely no reason that Mrs. Feeney could not have pressed her claims on behalf of the entire class during the course of this litigation, and no reason for her now to repeat the litigation cycle on the "new" theory or as a representative of a new class.

The merits of the Plaintiff's "new" theory may also have been a factor in the discretionary decision whether to permit the equivalent of an amendment to the complaint. The new theory may be articulated in the following terms: by systematically excluding non-veterans from meaningful civil service employment, application of the veterans preference statute denies them of a liberty interest in violation of the due process clause. In light of the law of this particular case, however, that is a demonstrably specious theory.

In paragraph 36 of her complaint, Mrs. Feeney alleged that by "systematically excluding qualified and eligible female applicants on the basis of sex, the Massachusetts Veterans Preference Statute deprived the plaintiff of the equal protection of the law and of due process." (J.S. 5a, 6a.) That claim, which was rejected by the lower court, differs from the so-called "new" claim only in that it characterizes the interest in prospective employment as a liberty interest and in that it

applies to persons of both gender. Neither of these factors is sufficient to render her new claim significantly different from the claim already decided against the plaintiff. Thus, when the lower court suggested that the "new claim at very best face[d] an uncertain future," (J.S. 10a), it was not engaging in hyperbole; the plaintiff simply could not prevail on her new gender based alternate theory.

Under all the circumstances of this particular case, the lower court did not abuse its discretion by denying plaintiff leave to brief and argue this newly developed due process theory.

CONCLUSION

For all the reasons set forth above, the Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to require further argument and therefore moves the Court to affirm the judgment entered in the cause by the United States District Court for the District of Massachusetts.

Respectfully submitted,

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